

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of: Ron Walli)
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Filing Date: February 15, 2023) Case No.: FIA-23-0013
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Issued: February 27, 2023

Decision and Order

On February 15, 2023, Ron Walli Walli (Appellant) appealed a Determination Letter issued to him from the Department of Energy’s (DOE) Oak Ridge Site Office (OSO) regarding Request No. ORO-2023-00202-F, a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. In its Determination Letter, OSO stated that it did not find any responsive documents in its search. Appellant challenged the adequacy of the search. In this Decision, we grant the appeal.

I. BACKGROUND

On October 14, 2022, Appellant submitted a FOIA request seeking “the reason for the dismissal of my complaint that proved via emails from UT-Battelle personnel that UT-Battelle violated the Fairness of Opportunity requirement clearly stated in its contract with DOE. Again, I would like DOE to specifically defend its decision.”¹ FOIA Request, FOIA Case File at 1–2. The FOIA analyst at DOE Headquarters assigned to the request contacted the FOIA official at OSO asking whether OSO had jurisdiction for the request, and OSO responded that it did. Email from Maysa Ceballos-Germosen to Linda G. Chapman and Rosa Maria Vasquez (Oct. 21, 2022), FOIA Case File at 11; Email from Linda G. Chapman to Maysa Ceballos-Germosen and Rosa Maria Vasquez (Nov. 8, 2022), FOIA Case File at 16. Accordingly, the request was transferred to OSO for processing. OSO searched its records from 2016 through the day it performed the search, as well as the e-mail accounts of the OSO Manager and Deputy Manager. Email from Michele Brandon to Linda G. Chapman, Johnny O. Moore, and Tonya Weber (Dec. 19, 2022), FOIA Case File at 24. OSO’s search did not yield any responsive records. Email from Michele Brandon to Linda G. Chapman, Johnny O. Moore, and Tonya Weber (Jan. 27, 2023), FOIA Case File at 29. OSO also indicated it was aware of a Part 708 whistleblower complaint the Individual had filed with a different DOE office. *Id.*

¹ Records responsive to FOIA requests include only those records in existence at the time the search is performed. *Aguiar v. DEA*, 992 F.3d 1108, 1111 (D.C. Cir. 2021). The FOIA does not require agencies to create records in response to a FOIA request or to add explanatory material to a document; a FOIA requestor “must take the agency records as he finds them.” *Id.* at 1112.

On January 10, 2023, OSO sent Appellant a Determination Letter informing him that no records responsive to his request had been located in the search. Determination Letter at 1. Appellant timely appealed, stating that the no records result was:

[A] direct contradiction to reality and ignores the email trail that I included in my complaint of corruption at Oak Ridge National Laboratory. I submitted this documented violation of DOE’s Fairness of Opportunity requirement to the DOE Office of Inspector General several times, actually, so it’s amazing that the response states ‘no records were found.’ Really? Here is the proof I submitted: . . .

Appeal at 1. Appellant went on to describe a dispute that occurred at OSO several years prior between Appellant and OSO’s management and operations contractor, UT-Battelle, regarding whether a press release should be issued. Appeal at 1–19. The appeal was Appellant’s first mention of the Office of the Inspector General (OIG) as pertaining to the FOIA request.

II. ANALYSIS

Under the FOIA, agencies are required to “conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Reporters Comm. for Freedom of the Press v. FBI*, 877 F.3d 399, 402 (D.C. Cir. 2017). An agency is obligated to search all locations likely to hold responsive records, unless doing so would cause an undue burden for the agency. *Heffernan v. Azar*, 317 F. Supp. 3d 94, 113 (D.D.C. 2018) (“[M]erely searching the location most likely [to contain responsive records] is not the relevant metric.” (internal quotation omitted)); *see also Valencia-Lucena v. United States Coast Guard, FOIA/PA Records Mgmt.*, 180 F.3d 321, 327 (D.C. Cir. 1999). The government “is no doubt correct that ‘the [agency] is in the best position to determine custodians most likely to have relevant records’ . . . [b]ut that truism—and the deference that accompanies it—does not insulate a search that overlooks locations where responsive materials are reasonably likely to be found.” *Judicial Watch, Inc. v. United States DOJ*, 373 F. Supp. 3d 120, 127 (D.D.C. 2019) (brackets in original; internal citations omitted).

FOIA requests must reasonably describe the records sought and the agency has a duty to construe requests liberally in favor of disclosure. *Wallick v. Agric. Mktg. Serv.*, 281 F. Supp. 3d 56, 67 (D.D.C. 2017). A request is reasonably described when the phrasing is “specific enough so that a professional employee of the agency who was familiar with the subject area of the request would be able to locate the record with a reasonable amount of effort.” *Id.* It is well established that the “linchpin inquiry is whether the agency is able to determine ‘precisely what records (are) being requested.’” *Yeager v. Drug Enf’t Admin.*, 678 F.2d 315, 326 (D.C. Cir. 1982) (quoting S.Rep. No. 854, 93d Cong., 2d Sess. 10 (1974); Source Book at 162) (parentheses in original).

Liberal construal of FOIA requests includes consideration of the requester’s sophistication in the realm of the FOIA. *Am. Oversight v. United States DOJ*, 401 F. Supp. 3d 16, 35–36 (D.D.C. 2019). A requester with a proven record of using precise language to describe the records requested will receive less latitude than a requester who has not demonstrated such sophistication in describing

records. *Id.* DOE regulations require the FOIA Officer to (1) inform a requester when the language of the request does not reasonably describe the records sought, and (2) work with the requester to clarify the language of the request. 10 C.F.R. §§ 1004.4(c)(2), 1004.5(a).

In this case, DOE did not search all locations where responsive documents were reasonably likely to be found. The request explicitly seeks records related to DOE's dismissal of a complaint regarding the violation of a contract requirement, which suggests that the request should have been referred to an office or offices that handle complaints, such as the Office of Hearings and Appeals (OHA) or the Employee Concerns Program (ECP), to determine jurisdiction for a search, in addition to OSO. If the analyst believed the request was not reasonably described, they should have clarified with Appellant which DOE office dismissed his complaint, so the correct office or offices could be searched. The DOE file does not indicate that OIG, ECP, OHA, or any other office besides OSO was contacted to perform a search for responsive records and also does not indicate the Appellant was contacted to clarify the language of his request. Moreover, when OSO identified Appellant's previous Part 708 Whistleblower complaint, the appropriate steps should have been taken to ensure that OHA and ECP, the two offices that process Part 708 complaints, conducted searches as well. However, there is no indication that any steps were taken toward that end. Accordingly, I cannot conclude that the search performed was reasonably expected to produce the information requested.

III. ORDER

For the foregoing reasons, I find that the search performed in response to Appellant's FOIA request was inadequate. It is hereby ordered that the Appeal filed on February 15, 2023, by Ron Walli, No. FIA-23-0013, is granted. This case is remanded to the DOE Office of Public Information for processing consistent with this decision.

This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect one's right to pursue litigation. OGIS may be contacted in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS, College Park, MD 20740
Web: <https://www.archives.gov/ogis> Email: ogis@nara.gov
Telephone: 202-741-5770 Fax: 202-741-5769 Toll-free: 1-877-684-6448

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